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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-410

COWLES COMMUNICATIONS, INC.,

Petitioner,

v.

JOSEPH L. ALIOTO,

Respondent.

Petition for a Writ of Certiorari

To the United States Court of Appeals
for the Ninth Circuit

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Petition for a Writ of Certiorari
To the United States Court of Appeals for the Ninth Circuit

The petitioner, Cowles Communications, Inc., ("Cowles"), defendant in this First Amendment libel action, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") entered in this proceeding on June 23, 1975.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported in *Joseph L. Alioto v. Cowles Communications, Inc.,* (No. 73-1834) (9th Cir. June 23, 1975), and is reproduced as Appendix A.

The opinion and order of the United States District Court for the Northern District of California (Civil No. 52150) (N.D.Cal. February 2, 1973) is reproduced as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was rendered on June 23, 1975. This petition for a Writ of Certiorari is timely filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a First Amendment libel case, freedom of speech is unconstitutionally abridged when the Court of Appeals applies the "usual" rule of civil review to reverse a judgment for the publisher based upon the trial judge's independent examination of the whole record after two complete jury trials?

2. In determining state law, may a federal court sitting in diversity disregard a recent definitive judgment of the state's highest court and select the "better rule"?

3. Whether the Court of Appeals may relieve plaintiff of his constitutional obligation to establish the falsity of the article taken as a whole?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the First Amendment to the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This case arises out of the publication by Cowles of an article entitled "The Web that Links San Francisco's Mayor Alioto and the Mafia," and subtitled "A Look Report on the Private Joseph Alioto and His Relationships with Organized Crime" in the September 23, 1969 issue of *Look* Magazine. The article is reproduced as Appendix C. Plaintiff, the Mayor of San Francisco at the time of publication, filed this First Amendment libel action in the United States District Court for the Northern District of California on September 5, 1969, based upon diversity of citizenship and claiming general and punitive damages totalling $12,500,000.

After extensive discovery, the initial trial took place in April and May, 1970. After 13 days of trial and four days of jury deliberations the court declared a mistrial when the jury could not return a verdict.

After additional discovery, the second trial commenced September 25, 1972, consuming 22 court days. At the close of all the evidence, the court reserved its rulings on the parties' motions for directed verdict pending jury determination. Subsequently, the jury returned a special verdict, finding that the article was false in one or more particulars and defamatory; however, the jury could not, after three days, return a verdict on the question of actual malice. The court thereupon declared a mistrial. Defendant moved for judgment in accordance with defendant's motion for directed verdict based on the lack of substantial evidence clear and convincing in nature that defendant published with actual malice as defined by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. Defendant moved for judgment on the further ground that plaintiff had failed to comply with the applicable California retraction statute (California Civil Code, Section 48a) and was thereby limited to special damages, which plaintiff

neither pleaded nor proved. That statute provides that where a plaintiff fails to demand a retraction, he is limited to recovery of special damages only.

The court granted defendant's motion. In his opinion and order, the trial court judge held that in a First Amendment case the court exercises a larger role in reviewing the evidence than in the ordinary civil jury action. Weighing his own conviction after an independent review of the record and the failure of two juries to find to the contrary, the trial court judge decided that malice in the required sense was not shown with convincing clarity. On the retraction issue, the court noted that following the first trial, the California Supreme Court decided the case of *Briscoe v. Readers Digest Association* 4 Cal.3d 529; 483 P.2d 34 (1971) wherein that court squarely applied the California retraction statute to the publisher of a magazine notwithstanding the fact that the statute did not specifically refer to magazines. The trial judge also noted that the *Briscoe* decision was the latest expression of the highest state court on the matter. Although there were prior inconsistent decisions at the intermediate appellate level and the trial court judge was impressed with the reasoning of those decisions, he did not believe that he had the power to anticipate that the California Supreme Court would repudiate its 22 month old decision in *Briscoe* under the circumstances of this case.

The Court of Appeals reversed the trial court judge on both the actual malice and the retraction issues. On the malice issue, the Court of Appeals held that the trial court could only grant the defendant publisher's motion for judgment n.o.v. if, after giving the plaintiff all possible inferences and resolving all questions of credibility in plaintiff's favor, the evidence still failed to demonstrate clearly and convincingly that Cowles published with actual

malice. The trial court, although itself persuaded on the whole record otherwise, had concluded that a jury could reasonably find for plaintiff assuming certain inferences and credibility issues in plaintiff's favor. Accordingly, the Court of Appeals reversed, relying on its recent holding in *Guam Federation of Teachers, Local 1581 v. Ysrael,* 492 F.2d 438 (9th Cir.), *cert. denied,* 419 U.S. 872 (1974), wherein the Court of Appeals repudiated the decision in *Wasserman v. Time, Inc.,* 424 F.2d 920 (D.C. Cir.), *cert. denied,* 398 U.S. 940 (1970) requiring both the trial judge and the jury to find actual malice before a plaintiff's judgment could be sustained in a First Amendment libel action. In remanding, the Court of Appeals ordered a new trial confined to the sole issue of actual malice.

On the retraction issue the Court of Appeals reversed the trial court judge on the basis of *Montandon v. Triangle Publications, Inc.,* 45 Cal.App.3d 938 (1st Dist. 1975) wherein the state intermediate appellate court, in a decision rendered after the trial judge's ruling, declined to apply Section 48a to a defendant magazine publisher notwithstanding the California Supreme Court's decision in *Briscoe.*

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in direct conflict with the decisions of two other United States courts of appeals and conflicts in principle with the decisions of a third and fourth United States court of appeals as to the proper rule for review of the evidence in a First Amendment libel case.

This Petition presents as an issue of first impression for this Court a significant aspect of the ongoing efforts to deal with the tension[1] necessarily existing between the need

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1. The tension is heightened by the protracted character of the present six-year litigation between the parties. See Affidavit of Ronald S. Diana attached as Appendix D.

for a vigorous and uninhibited press and a legitimate interest in redressing wrongful injury.

In a First Amendment libel case, there must be an independent examination of the entire record to assure that a plaintiff's judgment does not constitute "a forbidden intrusion on the field of free expression." *New York Times Co., supra,* at 285. This examination is not precluded by the Seventh Amendment when a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary to analyze the facts in order to pass upon the federal question. This Court has "repeatedly recognized that the courts may not avoid an excursion into factfinding in this area simply because it is time consuming or difficult". *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 53 (1971). This Court has further declared that it "'has an obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments,' and in doing so 'this Court cannot avoid making an independent constitutional judgment on the facts of the case.'" [citation omitted]. *Rosenbloom, supra,* at 54. "The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review". *Rosenbloom, supra,* at 54.

Acting on this language and backed by the respectable authority of several courts of appeals, the trial judge, after the second hung jury, made an objective examination of the whole record and concluded that malice in the required sense was not shown with convincing clarity. In accord with his concept of his duty to protect First Amendment rights and in accord with the directives of this Court referred to above, he entered judgment for the defendant publisher on January 30, 1973.

In doing so he was tripped up by a subsequent opinion of his court of appeals in *Guam Federation of Teachers,*

Local 1581 v. Ysrael, 492 F.2d 438 (9th Cir.), *cert. denied,* 419 U.S. 872 (1974), reversing a directed verdict for the defendant at the close of plaintiff's evidence. The reliance in *Ysrael* as in the opinion below was on the usual rule that the party against whom a motion for a directed verdict or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. The court condemned any attempt by either the trial judge or the appellate court to weigh credibility or to choose among legitimate inferences in a First Amendment libel case.

No one doubts the utility of the usual standard in the normal civil case where it is "no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor", but the court below fell into serious error in ignoring the remaining words of the above quotation: "In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. • • • the possibility of such error • • • would create a strong impetus toward self-censorship which the First Amendment cannot tolerate." *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 53 (1971). While Justice Brennan was there speaking of the inutility of a negligence standard of liability to protect First Amendment values, the same considerations should apply to disqualify a rule which perforce must remain blind to the profound significance of erroneous verdicts for plaintiffs.

Aware of the Draconian nature of the usual rule and obedient to the principles first enunciated in *Sullivan,* Judge J. Skelly Wright with Judge Robinson concurring, in *Wasserman v. Time, Inc.,* 424 F.2d 920 (D.C. Cir), *cert.*

denied, 398 U.S. 940 (1970), set forth the two step rule quoted by the court below whereby both judge and jury must be satisfied after a full review of the facts including credibility questions that First Amendment rights have been preserved.

The Fifth Circuit promptly followed and quoted the two step rule in *Bon Air Hotel, Inc. v. Time, Inc.,* 426 F.2d 858, 864 (5th Cir., 1970). Their adherence to the rule that in First Amendment cases there must be an independent examination of the record is demonstrated by *Vandenburg v. Newsweek, Inc.,* 507 F.2d 1024, 1026-1027 (5th Cir. 1975).

Directly inapposite to the decision below is the opinion of the Eighth Circuit in *Baxter Berry v. National Broadcasting Company, Inc.,* 480 F.2d 428, 432 (8th Cir. 1973), where the court declared in setting aside verdict for plaintiff:

> "Ordinarily, we would resolve the question by examining the evidence in a light most favorable to the party having the verdict and overturn it only if the verdict were clearly erroneous. In First Amendment cases however, this Court must make an independent judgment as to whether the facts will support a verdict for the plaintiff without abridging the rights of freedom of speech and press as guaranteed by the First and Fourteenth Amendments. [*New York Times v. Sullivan, supra; Rosenbloom v. Metromedia,* 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296.]

It appears that the governing rule in the Seventh Circuit would be in accord based upon the language of *Gertz v. Robert Welch, Inc.,* 471 F.2d 801 (7th Cir. 1972), *rev'd on other grounds* 418 U.S. 323 (1974). After stating "an appellate court has an independent obligation to make its own analysis of the record before a finding that a comment was reckless may be approved" the court concluded

that "Our examination of the record satisfies us that 'the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands. *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81, 83". It is significant that in footnote 15 found on page 807 of the reported opinion together with the above quotations the court specifically noted "plaintiff did present evidence of malice (both the 'constitutional' and the 'ill-will' type)".

Turning the other cheek it is apparent that the Third Circuit has chosen to adopt the usual rule at least when reviewing (and reversing) summary judgment for the defendant. *Taggart v. Wadleigh-Maurice, Ltd.,* 489 F.2d 434, 439 (3rd Cir. 1973), *cert. denied,* 417 U.S. 937 (1974).

The Second Circuit joins the Third and Ninth in opposing the Fifth, Seventh, Eighth and District of Columbia Circuits, since in *Goldwater v. Ginzburg,* 414 F.2d 324, 337 (2nd Cir. 1969), *cert. denied,* 396 U.S. 1049 (1970) the court approved the action of the district court in viewing the evidence "in the light most favorable to the party opposing the motion" and denying defendant's motion for summary judgment.

2. The clear conflict between the courts of appeals opposed four to three calls for the exercise of this Court's certiorari jurisdiction to bring about uniformity of decision in a sensitive area of constitutional freedoms.

Inspection of the opinions cited above reveals square and irreconcilable conflict on an important and inevitably recurring issue of federal procedural law.

The court below setting its compass by the Seventh Amendment has twice denied any power on the part of the judiciary to weigh the evidence in order to protect First Amendment principles. In this it has been joined by two other courts of appeals.

With equal specificity the courts of appeals for the Fifth and District of Columbia circuits supported in principle by

decisions of the Seventh and Eighth take the opposite tack. In their view this Court's First Amendment decisions require trial and appellate judges to weigh the evidence and make independent judgment as to whether First Amendment rights have been abridged.

Nothing in the language by which the opposing circuits make their positions known furnishes any ground for belief that the conflict will be reconciled absent this Court's intervention. Indeed the depth of the split and the number of adversary courts forbids this conclusion.

This Court's concern for precise and uniform application of the law, both procedural and substantive in this area is amply demonstrated by the nineteen decisions handed down since *Sullivan* in 1964. Collateral to the issue of constitutional rights is this Court's opportunity to secure uniformity of application of the Rules of Federal Civil Procedure. See *Hanna v. Plumer,* 380 U.S. 460, 463 (1965).

3. The nonfinal character of the judgment below should not deter the Court.

Petitioner recognizes a special responsibility in petitioning the Court where the judgment below is nonfinal.

Given the importance of the question presented, the split of circuits discussed above, the Court is urged to recognize that the decisions below (Appendices A and B) limn the issues with unusual clarity. Thus, resolution of the first or second question presented could be accomplished on a very abbreviated record.

Disposition favorable to petitioner on either question would result in final resolution of this litigation, a result commending itself in this class of cases if the stultifying effect of protracted litigation tending toward self-censorship is to be avoided, *New York Times Co. v. Sullivan, supra* at 279.

Until the conflict between the circuits is resolved, uncertainty and uneven application of First Amendment protection seems inevitable. The sensitivity of the Court to this problem in the First Amendment area has been recently noted. See Justice Blackmun, concurring *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 354 (1974).

There is, of course, ample precedent for review of nonfinal judgments in First Amendment cases, *Time, Inc. v. Pape,* 401 U.S. 279 (1971), and cases dealing with the scope of jury trial, *Beacon Theatres v. Westover,* 359 U.S. 500 (1959).

4. The Court of Appeals' failure to follow a recent decision of the highest state court directly controlling on a matter of state law is in conflict with this Court's decisions in Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) and its progeny.

Only absent a recent and controlling decision by the highest state court is a federal court permitted to sit as a state court and predict the holding the highest court of the state would apply. *Commissioner v. Bosch,* 387 U.S. 456, 465 (1967); *Bernhardt v. Polygraphic Co.,* 350 U.S. 198 204-205 (1955). In this case, the highest state court supplied the controlling rule of decision in *Briscoe v. Readers Digest Association,* 4 Cal.3d 529; 483 P.2d 34 (1971). The district court judge, applying *Erie* principles, concluded that *Briscoe* was controlling on the issue of whether the California retraction statute applied to magazines. That determination is entitled to great weight. *Owens v. White,* 380 F.2d 310, 315 (9th Cir. 1967) *American Timber & Trading Co. v. First Nat'l Bank of Oregon,* 511 F.2d 980, 983 (9th Cir. 1974).

The Court of Appeals' failure to follow and apply the holding of *Briscoe* is without precedent and raises serious and substantial questions regarding the continued vitality of the doctrine that federal courts must follow decisions of

the highest state court in diversity cases. A federal court simply cannot be free to psychoanalyze state court judges and anticipate a change in state law directly opposite from a recent decision of that highest state court on point.

5. The Court of Appeals' failure to require plaintiff to sustain his constitutional burden to prove the falsity of the article taken as a whole calls for the exercise of this Court's power of supervision.

Since this case involves a public official, the plaintiff is constitutionally required to prove the falsity of the subject article. *Cox Broadcasting Corporation v. Cohn,* —— U.S. ——, 43 L.Ed.2d 328, 346 (1975). Specifically, California tort law requires that proof of falsity be derived from the gist or sting of the article taken as a whole. *Handelsman v. San Francisco Chronicle,* 11 Cal.App.3d 381, 388, 389; 90 Cal.Rptr. 188 (1st Dist. 1970).

The gist of petitioner's article is set forth in the first nine lines which summarized the web of relationships linking the plaintiff with organized crime.

> "Mayor Joseph L. Alioto of San Francisco, the rising politician who came close to the Democratic nomination for the Vice Presidency in 1968, is enmeshed in a web of alliances with at least six leaders of La Cosa Nostra. He has provided them with bank loans, legal services, business counsel and opportunities, and the protective mantle of his respectability. In return, he has earned fees, profits, political support and campaign contributions." (Appendix C, ll. 1-9)

The balance of the text set forth with names, places and dates the nature and extent of the summarized relationships. As memorialized in the Pretrial order, plaintiff selected and placed into dispute from the 642 line article a total of 28 particulars, undertaking to establish the falsity of only those distinct portions of the article. In the jury instructions

each of those particulars (underscored in Appendix C) was read and submitted as a fact question on the issue of falsity. Neither the jury nor the trial court determined that the gist of the article taken as a whole was false. By its special verdict, the jury indicated only that the article was false "in one or more particulars" (Appendix B, p. 4).

The Court of Appeals transformed this limited and inconclusive response into a decision that the entire article was false, and sought to foreclose any further inquiry regarding the truth of the whole article by remanding the case for a partial new trial solely on the actual malice issue. (Appendix A, pp. 2, 8.)

In relieving plaintiff of his constitutional burden to prove the falsity of the article taken as a whole, the Court of Appeals violated petitioner's First Amendment right and deprived petitioner of substantial due process rights to a jury determination on this issue. The importance of the plaintiff's obligation to prove the falsity of the gist of the article taken as a whole can hardly be overstated since this issue is central to plaintiff's right to proceed to the issue of actual malice.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should issue to review and reverse the opinion and judgment of the Court of Appeals of the Ninth Circuit.

Respectfully submitted,

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September 14, 1975.

Appendix A

United States Court of Appeals for the Ninth Circuit

Filed Jun 23 1975

No. 73-1834

Joseph L. Alioto
Plaintiff-Appellant

vs.

Cowles Communications, Inc.
Defendant-Appellee

OPINION

Appeal from the United States District Court
for the Northern District of California

Before: WRIGHT and CHOY, Circuit Judges, and EAST,* District Judge.

CHOY, Circuit Judge:

The September 23, 1969, issue of LOOK magazine contained an article entitled "The Web That Links San Francisco's Mayor Alioto and the Mafia: A LOOK report on the private Joseph Alioto and his relationships with organized crime." The article, written by two young employees of a San Francisco television station, accused Alioto of using his position as chairman of the board of a San Francisco bank to obtain loans for a trucking company run by James Fratianno, a convicted felon alleged to be a West Coast Mafia operative. The source of the information upon which this accusation was based was Fratianno's son-in-law, Tommy Thomas. Thomas claimed that Fratianno had told him of a number of meetings between Alioto and several

*The Honorable William G. East, Senior District Judge for the District of Oregon, sitting by designation.

underworld figures at the Nut Tree, a Bay Area restaurant. Thomas also claimed knowledge of connections between the Mafia and other prominant politicians. FBI and California law enforcement authorities were unable to corroborate the alleged meeting or other relationships between Alioto and the Mafia.

After agreeing to buy the article, LOOK editors had the authors interview Alioto. The authors asked Alioto about his connections with Fratianno, but did not tell him of their forthcoming Nut Tree accusations. When Alioto later learned that an article was to be published, he demanded, in a series of telegrams, a meeting with LOOK editors. LOOK officials replied that such a meeting would serve no useful purpose, since the story had already been sent to the printers.

Alioto responded by filing a libel suit in federal district court against LOOK's publisher, Cowles Communications, Inc. The first trial ended in a hung jury. On retrial, the jury returned a special verdict, finding that the article was false and that it was defamatory. The jury was unable to agree whether the article had been published with the requisite actual malice, however.

Despite this inconclusive verdict, the district judge awarded judgment to Cowles. He held that a finding of actual malice by both judge and jury was required in order for Alioto to recover, and that he found that actual malice "was not shown with convincing clarity." Therefore, he granted Cowles' motion for judgment n.o.v. Furthermore, he found that Alioto was entitled only to special damages because he had not complied with the requirements of Cal. Civ. Code § 48a by demanding a retraction within 20 days of publication; Alioto had demanded only general and punitive damages, so the judge granted Cowles' motion for summary judgment.

Alioto appeals. We reverse and remand for a new trial on the issue of actual malice.

Retraction

California permits a publisher or broadcaster to escape liability for general damages in a libel suit if he publishes or broadcasts a retraction upon proper demand:

> 1. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous.

Cal.Civ.Code § 48a(1).

On its face, section 48a does not apply to magazines. One division of the California Court of Appeal has held explicitly that magazines are not covered by either the letter or the rationale of section 48a. *Morris v. National Federation of the Blind,* 192 Cal.App.2d 162, 13 Cal.Rptr. 336 (1961). Other divisions have applied section 48a to magazines without apparent notice that the statute specifies libels in newspapers, not all printed media. *Shumate v. Johnson Publishing Co.,* 139 Cal.App.2d 121, 293 P.2d 531 (1956); *Harris v. Curtis Publishing Co.,* 49 Cal.App.2d 340, 121 P.2d 761 (1942).

The California Supreme Court has added to the confusion in an opinion applying section 48a to the Reader's Digest. *Briscoe v. Reader's Digest Association,* 4 Cal.3d

529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971). In two sentences near the end of a long opinion, the *Briscoe* court stated only that the plaintiff had not complied with the requirements of section 48a, and thus was limited to recovery of special damages. The court did not discuss the contrary decision in *Morris,* nor the fact that it was construing "newspaper" to include magazines.

In a case decided this year, a division of the Court of Appeal has refused to acknowledge *Briscoe* as requiring extension of 48a to publishers of magazines. *Montandon v. Triangle Publications, Inc.,* 45 Cal.App.3d 938, 120 Cal. Rptr. 186 (1975). The *Montandon* court carefully analyzed the judicial history of the issue, observing that *Morris* had been the only reasoned decision to date. The court observed that section 48a(3) requires that a retraction be published within three weeks of the demand. While publication within this time would have been possible for the weekly magazine involved in the *Montandon* litigation, the *Montandon* court was unwilling to adopt a construction of the statute which would require a distinction between weekly and biweekly magazines on the one hand and monthly magazines on the other. The court also emphasized the validity of the distinction made in *Morris* between newspapers and broadcast media, which are under pressure to disseminate "news while it is new," and magazines, which have the advantage of greater leisure in which to ascertain the truth of accusations before publishing them. Finally, in examining the legislative history of section 48a, the *Montandon* court observed that the statute originally applied only to newspapers, but had been amended in 1945 and again in 1949 to extend coverage to radio and then to television. The legislature had not seen fit, however, to amend the statute again in 1961 following

the *Morris* decision in order to extend coverage explicitly to magazines.

We find the reasoning presented by the *Montandon* opinion persuasive. The California Supreme Court has declined to review *Montandon.* Although this action does not of itself indicate approval of the *Montandon* decision, we conclude that if it were confronted with the issue it would decide that, notwithstanding its decision in *Briscoe,* section 48a's requirement of a demand for retraction does not extend to libels appearing in magazines. Therefore, we reverse the district court's judgment that Alioto's claim was limited to special damages and that, having claimed no special damages, he was entitled to no relief.

Actual Malice

In order to recover damages for publication of libelous statements relating to official conduct, a public official must establish that the defendant published the falsehood with actual malice—"that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan,* 376 U.S. 254, 280, (1964). "Reckless disregard" does not refer to an objective "reasonable man" standard. The defendant must be proved to have subjectively "entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968). To protect first amendment values, the Court requires a higher standard of proof than the usual "preponderance of the evidence"; the recklessness must be demonstrated by "clear and convincing proof." *See e.g., Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 30 (1971). Because of the importance of the interests in freedom of speech and press which are at stake, a court must review the facts to determine whether the jury applied the proper

standard; simply ascertaining that the jury was properly instructed does not suffice. *New York Times,* 376 U.S. at 285; *Rosenbloom,* 403 U.S. at 55.

In his opinion granting Cowles' motion for judgment n.o.v., the district judge stated that a jury could justifiably find that the evidence proved with convincing clarity that the libel was published either with or without actual malice. He then weighed for himself the persuasiveness of the evidence and the credibility of witnesses, took into account that Alioto had twice failed to convince a jury of Cowles' actual malice, and decided that Alioto had failed to establish actual malice.

The court thus implied that a plaintiff in a libel action must persuade two triers of fact: both judge and jury. Judge Skelly Wright has stated the proposition:

> [T]he trial court, at the close of the plaintiff's case must decide whether actual malice has been shown with 'convincing clarity.' In making this judgment the court will judge the credibility of the witnesses and draw its own inferences from the evidence. If the trial is permitted to proceed, the court will be called upon again to make a judgment on the actual malice issue at the close of all of the evidence. If the motion for a directed verdict at this stage of the trial is denied, the actual malice issue, along with the other issues, is then submitted to the jury under the *Times* instruction without any indication from the court or counsel that the court has decided that the evidence shows actual malice with 'convincing clarity.'
>
> This two-step procedure in which both the trial judge and the jury must find actual malice before there can be judgment for the plaintiff provides the protection of the First Amendment freedom that *Times* sought to make secure in areas of public concern".

Wasserman v. Time, Inc., 424 F.2d 920, 922-923 (D.C. Cir.), *cert. denied,* 398 U.S. 940 (1970) (Wright, J., concurring); *see Bon Air Hotel, Inc. v. Time, Inc.,* 426 F.2d 858 (5th Cir. 1970).

Following the district court's decision, however, we repudiated Judge Wright's two-step approach in *Guam Federation of Teachers, Local 1581 v. Ysrael,* 492 F.2d 438 (9th Cir.), *cert. denied,* 419 U.S. 872 (1974). A district judge on motion for judgment n.o.v., or an appellate judge on review, must examine the evidence to see whether, if all permissible inferences were drawn in the plaintiff's favor and all questions of credibility were resolved in his behalf, the evidence then would demonstrate by clear and convincing proof that the libelous material was published with actual malice. Once this question has been resolved in the plaintiff's favor, the jury's findings as to those inferences and as to witness credibility are determinative.

The district court, while granting Cowles' motion for judgment n.o.v., found that:

> Judging the whole matter objectively on the whole record I think that a jury justifiably could find that the evidence showed with convincing clarity that the authors (and as of the date of publication their states of mind could be imputed to defendant) were ambitious young men, anxious to sell a sensational story to a national magazine; that the Tommy Thomas statements as to the Nut Tree meetings added greatly to the sensational nature and salability of the article; that the authors must have had doubts about the veracity of Tommy Thomas (the sole source of the Nut Tree statements); that they deliberately failed to cross-check on the validity of his statements because they did not want to find them to be untrue, and so published the statements with a reckless disregard for truth.

Our review of the record convinces us that the district judge fairly summarized the permissible inferences which a jury might draw from the evidence. Having found the evidence that LOOK's editors entertained doubts as to the truth of the Nut Tree allegations to be sufficiently clear and convincing in nature were the jury to decide questions of credibility and draw permissible inferences in Alioto's favor, the court was without power to award Cowles judgment notwithstanding the jury's failure to arrive at a verdict. The judgment must be reversed and the case remanded for a new trial on the sole issue of actual malice.

Reversed and Remanded.

Appendix B

In the United States District Court
for the Northern District of California

Original Filed
Feb 2 1973

Civil No. 52150

Joseph L. Alioto,
Plaintiff,

vs.

Cowles Communications, Inc.,
Defendant.

OPINION AND ORDER

Defendant's motion for judgment notwithstanding the verdict on the ground that there was insufficient evidence to prove malice is granted, and plaintiff's motion asking that the court determine that there was malice as a matter of law is denied.

Defendant's motion for summary judgment on the ground that plaintiff did not comply with Cal. Civ. Code § 48a (West 1954) and did not claim special damages is granted.

On the issue of malice:

Judging the whole matter objectively on the whole record I think that a jury justifiably could find that the evidence showed with convincing clarity that the authors (and as of the date of publication their states of mind could be imputed to defendant) were ambitious young men, anxious to sell a sensational story to a national magazine; that the Tommy Thomas statements as to the Nut Tree meetings added greatly to the sensational nature and salability of the article; that the authors must have had

doubts about the veracity of Tommy Thomas (the sole source of the Nut Tree statements); that they deliberately failed to cross-check on the validity of his statements because they did not want to find them to be untrue, and so published the statements with a reckless disregard for truth.

On the other hand, and again judging objectively, I believe that on the whole record a jury from the evidence reasonably could find that Carlson was telling the truth when he said "I listened to him (Thomas) tell me about a meeting or meetings that made perfect sense to me in light of all the other things I know about the people he said participated in those meetings."

Although I believe that the article is false in the statements as to the Nut Tree meetings[1] and places plaintiff in a false light in other statements, I find that malice in the required sense was not shown with convincing clarity. I do not attempt to detail all of my reasons for this conclusion because I do not believe that it would be helpful to the parties or to a reviewing court.[2] I do note, however, that I think there was an inherent honesty in the manner in which Carlson treated the notes of the Thomas interview. Handwritten notes were made at the time of the interview. These were later put in typewritten form and

1. I have in mind the other evidence upon which plaintiff relies to establish malice such as the coloring of the language, the mutilation of the note books, and the prepublication communications between plaintiff and Gardiner Cowles, but it is my opinion that unless malice, in the sense of a knowledge that the statements were false or a reckless disregard of whether they were true or false, can be found with respect to the Nut Tree meetings then it cannot be found with convincing clarity.

2. My reaction is based upon the interplay of a myriad of factors including a subjective reaction to the various witnesses. Certainly any layman or any other judge might regard any factor and its interplay with any other factor differently than I do.

placed in the author's notebook. If it is to be said that some of the Thomas story was so incredible that Carlson had to disbelieve it and had Carlson had a purpose to deceive (either in anticipation of litigation or to sell the article) then I think that he would not, as he made the typewritten notes of the interview, have carried into them the material which makes Thomas appear incredible. After all, the ammunition with which the attack on Thomas is mounted comes from the Carlson notes, and had he put in them nothing more of the Thomas interview than appears in the article there would not be much of that ammunition.

This case has been twice tried. Able lawyers have twice explored and examined with a painful thoroughness the facts and inferences bearing upon the malice problem. The plaintiff has been publicly vindicated in that two judges and at least one jury have found that the article was false in one or more particulars, but the plaintiff has been unable to secure a favorable jury finding on the malice issue.

Weighing together my finding (entitled to a greater weight in this case than in the ordinary case[3]) and the failure of two juries to find to the contrary I have decided that a judgment for the defendant should be entered on the malice issue.

On the Section 48a issue:

Cal. Civ. Code § 48a (West 1954) provides in substance that the victim of a libel by newspaper or slander by radio broadcast may within 20 days after knowledge of publication give to the publisher written notice specifying the

3. In these first amendment cases a court does exercise a larger role in reviewing the evidence than it does in the ordinary jury action. *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Wasserman v. Time, Inc.*, 424 F.2d 920, (D.C. Cir. 1970); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

statements claimed to be libelous and demanding a correction. If within three weeks following the notice there is not a sufficient retraction the victim may then sue in libel for general and exemplary damages; otherwise he is limited to special damages.

In this case plaintiff disavows any claim for special damages and a question arises whether he may claim general and exemplary damages. Prior to the time that the Look magazine in question was distributed plaintiff learned that an article about him was to appear in it. There was an exchange of telegrams between plaintiff and defendant. The main thrust of plaintiff's telegrams was that the article was libelous and that given a hearing by Look editors (as distinguished from Carlson and Brisson) plaintiff could demonstrate falsity. The magazine was dated September 23, 1969, but appeared on the newsstands on September 9, 1969. The action was filed on September 5, 1969.

There was no compliance with section 48a. There was no demand for correction.[4] (Plaintiff concedes this in a deposition.) Plaintiff did not wait for retraction before he filed the lawsuit and it is very questionable whether the telegrams sufficiently specified the statements claimed to be libelous.

Following the first trial of this case the California Supreme Court decided the case of *Briscoe v. Reader's Digest Ass'n*, 4 Cal.3d 529, 483 P.2d 34 (1971).[5] In that case the court examined the vulnerability of a complaint to a general demurrer and held that the complaint did not

4. The facts are remarkably similar to those in *Farr v. Bramblett*, 132 Cal.App.2d 36, 281 P.2d 372 (1955).

5. In a diversity action a federal court must follow changes in controlling state law which occur before the federal judgment becomes final. *Vandenbark v. Owens-Illinois Co.*, 311 U.S. 538 (1940).

state a cause of action on a false light theory. The court said at p. 44:

> We have previously stated that a "false light" cause of action "is in substance equivalent to * * * [a] libel claim, and should meet the same requirements of the libel claim * * * including proof of malice (cf. Time, Inc. v. Hill (1967) 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed. 2d 456) and fulfillment of the requirements of section 48a [of the Civil Code]. (See Werner v. Times-Mirror Co., 193 Cal.App. 2d 111, 122-123, 14 Cal.Rptr. 208.)" (Kapellas v. Kofman, *supra*, 1 Cal. 3d 20, 35, fn. 16, 81 Cal.Rptr. 360, 459 P.2d 912.)
>
> Plaintiff here alleged malice, but at no time complied with the requirements of section 48a. It would therefore be possible for him to amend his complaint to state a cause of action based on a "false light" theory only if he alleged special damages.
>
> (Footnote omitted.)

This case has not been overruled.[6]

6. I am aware that the decision does not even discuss the extension of the words "newspaper" or "radio broadcast" to magazines, does not discuss the problems of applying the three-week period for retraction to a monthly magazine and does not discuss the confused state of the prior California Court of Appeals decisions. *Harris v. Curtis Publishing Co.*, 49 Cal.App.2d 340, 121 P.2d 761 (1942); *Shumate v. Johnson Publishing Co.*, 139 Cal.App.2d 121, 293 P.2d 531 (1956); *Morris v. National Federation of the Blind*, 13 Cal.Rptr. 336, 192 Cal.App.2d 162 (1961). It was agreed by the parties that the question of the applicability of section 48a to a magazine was not raised by the parties or discussed in the briefs and that no petition for rehearing was filed asking the court to reconsider. I am impressed by the reasoning of *Morris v. National Federation of the Blind, supra*, and feel that were the problem directly submitted to the California Supreme Court there is a substantial possibility that *Briscoe v. Reader's Digest Ass'n*, 4 Cal.3d 529, 483 P.2d 34 (1971), would be repudiated. Despite all of this I do not believe that I have the power to anticipate that repudiation under the circumstances here. *See* the opinions in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956).

It is urged that the decision in *Briscoe v. Reader's Digest Ass'n, supra,* should not be applied retroactively. In California the usual practice is to give court decisions a retroactive effect. *County of Los Angeles v. Faus,* 48 Cal. 2d 672, 312 P.2d 680 (1957), *Connor v. Great Western Savings and Loan Ass'n,* 69 Cal.2d 850, 447 P.2d 609 (1968). There are exceptions to the rule but in view of the fact that the California Supreme Court had not spoken and that the state of the California law, as revealed by the appellate court decisions, was confused, I do not think that this case falls within any of the exceptions.

IT IS THEREFORE ORDERED that the plaintiff be denied all relief. Each party shall bear its own costs.

DATED this 30th day of January, 1973.

/s/ Russell E. Smith
Russell E. Smith
United States District Judge

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THE WEB THAT LINKS

SAN FRANCISCO'S MAYOR ALIOTO AND THE MAFIA

A LOOK report on the private Joseph Alioto and his relationships with organized crime

BY RICHARD CARLSON AND LANCE BRISSON

MAYOR JOSEPH L. ALIOTO of San Francisco, the rising politician who came close to the Democratic nomination for the Vice Presidency in 1968, is enmeshed in a web of alliances with at least six leaders of La Cosa Nostra. He has provided them with bank loans, legal services, business counsel and opportunities, and the protective mantle of his respectability. In return, he has earned fees, profits, political support and campaign contributions.

A lengthy investigation by LOOK reveals that some of these links between Alioto and the underworld go back almost a quarter of a century. They have not been broken.

Joseph Lawrence Alioto is a political phenomenon. A relative unknown when he took office 20 months ago, he shot to national prominence almost immediately. Following his powerful speech nominating Hubert Humphrey at the Democratic convention, Alioto returned to California as the state's leading Democrat. He is now preparing to challenge Republican Ronald Reagan for the governorship next year.

Bald but still youthfully bull-shouldered, the 53-year-old Alioto is the only son of a Sicilian fish merchant who immigrated with his family to San Francisco at the turn of the century. The Mayor, who made millions as a businessman and noted antitrust lawyer, proudly recalls his family's early struggles. His life-style, however, is radically altered from what he knew in the years of poverty. He drives a black Rolls-Royce, prefers expensively tailored dark suits and lives in a luxurious home in an elegant neighborhood. His language is polished and uttered with insistent authority. Expressive gestures invariably emphasize the important points.

But the public Joseph Alioto bears little resemblance to the private Joseph Alioto whose name appears on dozens of pages of law-enforcement intelligence reports in California and Washington. These reports and LOOK's investigation detail a number of the relationships between Alioto and organized crime.

DURING A TEN-MONTH PERIOD IN 1965, a notorious Cosa Nostra killer, Jimmy "The Weasel" Fratianno, received a series of loans totaling $105,000 from the First San Francisco Bank. The chairman of the board of directors and one of the founders of the bank was Joseph Alioto. In fact, it was Joseph Alioto who personally arranged for the loans after several meetings with Fratianno and other Mafia leaders.

The Weasel is not someone usually invited home for dinner—or into a bank for a loan. Testifying in 1958 before the California State Assembly Rackets Investigating Subcommittee, Capt. James E. Hamilton, head of the Los Angeles Police Department Intelligence Unit, said: "He [Fratianno] had long been ...considered by us to be the chief executioner for the Mafia on the West Coast. I have heard as high as 16 deaths attributed to Fratianno." State and Federal authorities believe now that he has graduated from the "muscle" role to that of the most influential and active Mafioso along the Pacific Coast. His avarice has also involved him in extortion, armed robbery, fraud and bookmaking. His arrest record, beginning with a rape charge at the age of 19, extends back 35 years to his hometown of Cleveland, Ohio. To the California State Assembly Rackets Investigating Subcommittee, Fratianno was an "important cog in the organisational wheel" of the Mafia. To Joseph Alioto, Fratianno was worth recommending to the loan officer of his bank as a man whose "credit is considered good by all with whom he has done business." Fratianno's "business" experience was almost nonexistent, and Alioto had to have known of his criminality. Fratianno had been in prison from 1954 to 1960 on an extortion charge. He was released from parole only a few months before Alioto recommended him. As for his "credit," Fratianno was a disastrous risk. He defaulted on the loans, leaving Joseph Alioto, who vouched for him, and the bank in the embarrassing position of trying to collect a debt from one of the most disreputable mobsters in the nation. A sizable part of the debt is still unpaid.

The exact origin of the Alioto-Fratianno relationship is unknown, but some of the details of how that association developed and finally blossomed have been pieced together by state and Federal investigators, and LOOK.

Fratianno has the ability to figure a profitable angle on just about everything. "If Jimmy meets a man with a million dollars, he wants half," a former close associate told us. "If he runs into a truck driver with $20, he wants $5." And it was within the California trucking industry that Fratianno sought to enrich himself. He began driving toward that goal—literally—as soon as he was released from prison in 1960.

With funds provided by two Cosa Nostra pals, both of whom have been linked to Alioto, Fratianno soon set up a small trucking company in Sacramento. His partners were his wife Jewel, his son-in-law, Tommy Lee Thomas, and:

—Frank "The Bump" Bompensiero, 63, a portly, cigar-chewing mobster identified by the FBI as a Mafia leader in San Diego. He was at the time on parole from San Quentin for bribing a public official. A Federal Bureau of Narcotics report describes Bompensiero as "a Mafia killer held in great fear by the underworld." An acquaintance told us he has "a great sense of humor, but [is] capable of shooting you in

continued

the back of the head in a minute."

—Angelo "Cheese King" Marino, 45, believed to be a cousin of Bompensiero and co-owner with his father Salvatore of the San Jose-based California Cheese Co., wholesale suppliers of ricotta and mozzarella cheese to pizzerias and supermarkets. Once heavily involved in the rackets in Pittsburgh, Pa., and Youngstown, Ohio, the Marinos still serve as important representatives of the Mafia on the West Coast. Salvatore Marino has been the subject of a 1964 deportation attempt by immigration authorities and was identified as a top Mafia racketeer in testimony before the U.S. Senate McClellan Committee. His son Angelo was prosecuted for income tax evasion in 1967, but the case was dismissed after his attorney elicited an admission from the FBI that it had been conducting electronic surveillance of the Marinos. The lawyer in this case and in all of the Marinos' important legal affairs for years was Joseph Alioto. Among the many services he performed for the Marinos was assistance in obtaining a $247,000 Small Business Administration loan for the cheese company, which, Alioto told us, "saved them from bankruptcy." After Alioto dispatched a law partner to Washington, the money for the two Mafia members was authorized in just 14 days—"Inordinately fast," an SBA lawyer told us.

Bompensiero and Marino remained in the background while Fratianno built up his business. He specialized in hauling dirt on highway-construction jobs and squeezing extra profits out of his drivers by refusing to pay them union scale. By late 1963, the Fratianno Trucking Co. was a potentially lucrative operation, and Fratianno—through Bompensiero and Marino—devised a plan that, as Fratianno put it, "will make us all rich."

Trucking in California is a cutthroat business. For small companies, profit margins are generally slim. The cost of expanding into a major carrier, however, is fearsome. Just one tractor-trailer rig costs around $37,000. Big money is needed to win big contracts. From his headquarters in Sacramento, Fratianno looked to Joseph Alioto in the West and Frank LaPorte in the East for help.

In Chicago, LaPorte, 64, is a top-rank Cosa Nostra chieftain. A former member of the Al Capone gang, he controls a variety of rackets and legitimate enterprises in southern Cook County and Will County (Illinois), and Lake County (Indiana).

Frank Bompensiero is an old friend of LaPorte and, according to Federal authorities, contacted the Chicagoan and informed him of the potential in California trucking.

At the same time, in the West, Bompensiero was in communication with Angelo Marino, Joseph Alioto's client in San Jose. The content of some of their conversations, often in Italian, is locked away in Government files. However, it is known that they discussed Jimmy Fratianno and his quest for expansion capital.

Alioto was then organizing his First San Francisco Bank and seeking out future customers. He had also been thinking of entering politics for the first time. But despite encouragement from fellow Democrats to run for mayor in 1963, he rejected the opportunity because of "business obligations."

Those obligations apparently included a series of nighttime meetings at the Nut Tree, a restaurant along the highway between San Francisco and Sacramento. Among those present at one or more of the conferences, in addition to Alioto, were Fratianno, Bompensiero, Angelo Marino, LaPorte and one of Jimmy Hoffa's top Teamster representatives on the West Coast. Alioto's plan to organize a bank was a subject of intense discussion.

After one meeting, Fratianno said he was "excited" about the possibilities for the future because "my man (Alioto)" would control the bank's board of directors. Fratianno also expressed the belief that he would be able to buy a piece of the bank's stock. Later, after another meeting at the Nut Tree, Fratianno said Alioto was excluding him because of his hoodlum reputation but had assured him he would be able to obtain loans from the bank.

The First San Francisco Bank opened its doors for business in July, 1964. Fratianno, still hungry for capital, did not forget the promise. Negotiations in San Francisco were arranged.

On the morning of November 5, 1964, Fratianno and Angelo Marino met with Joseph Alioto at his 111 Sutter St. law offices to discuss Fratianno's finances. Alioto called the bank to set the loan wheels in motion. Later in the day, two intelligence agents saw the pair of mobsters visiting the Bay Area's senior Cosa Nostra boss, Jimmy Lanza, at his olive-oil company's office. Fratianno and Marino were either paying a courtesy call on the resident Mob boss or soliciting his advice or help. Lanza, who was in the vicinity of the convention of Mafia dons at Apalachin, N.Y., in 1957, has been friendly with members of the Alioto family for more than 30 years. In fact, Lanza's father, a San Francisco Cosa Nostra chieftain until his death in 1937, was in business with Alioto's father in a Fisherman's Wharf restaurant.

A police stakeout on Lanza, after the Apalachin trip, revealed numerous instances of Alioto-Lanza contact. One day in 1958, agents observed Joseph Alioto and his father meeting with Lanza at the latter's office. Joseph Alioto was the first to leave and was later interrogated by Federal agents. He stated he was planning to accompany Lanza to Los Angeles the next day to represent him before a grand jury investigating the Apalachin affair. Apparently unnerved by his encounter with Federal authorities, Alioto sent another lawyer from his office in his stead.

Two months after the 1964 meetings at the Alioto and Lanza offices, Fratianno received the first of five loans from the First San Francisco Bank.

On January 19, 1965, the bank made out a $28,000 cashier's check in favor of the Fratianno Trucking Co.; an additional $27,000 was placed in a checking account; and a $5,510 discount charge was levied against the loan. The signatures on the loan agreement were those of Fratianno's wife Jewell and their son-in-law, officers of the company. The cashier's check was given to a San Jose equipment firm, one of whose owners is a friend of Angelo Marino, as part payment on 16 dump trailers that Fratianno was buying from them. The trailers provided the collateral for this first loan.

Within two weeks of receiving this $55,000 loan, Fratianno stepped out of the role of under-financed trucker long enough to funnel $35,000 to a man who joined in a Mafia bid for a Las Vegas casino.

LATE IN JANUARY, Fratianno was hospitalized in Los Angeles, where he had a sack of "ping-pong balls" removed from his chest cavity. The balls had been installed years before after a lung removal. While he was in the hospital, Fratianno whiled away his recuperation by making repeated long-distance calls to Angelo Marino in San Jose. He was at the same time in the process of obtaining further loans from Alioto's San Francisco bank.

The bank quickly discovered the drawbacks of dealing with Mafiosi like Fratianno. On April 6, 1965, a state investigator assigned to surveillance of organized crime inquired about the transaction. He was put in touch with the bank's vice president, Joseph R. Demers, who, he noted, was obviously upset about being interviewed on this subject.

Asked whether Fratianno had approached the bank by himself or had been recommended, Demers said he was introduced by "Joseph Alioto, who is a client of the bank and a well-known attorney." Alioto had then gone on to make the incredible statement: "his credit is considered good by all with whom he has done business." Demers did not mention that Alioto was the chairman of the board of the bank.

Inquiries about the loan did not stop the bank from doing further business with Fratianno. Between May and October of that year, Alioto's bank extended four more loans. The money, $105,000 in all, helped recapitalize a Mafia-controlled and -operated trucking company that cheated its drivers, cheated insurance companies, stole truck parts from rivals and, in a little over a year, would have a fatal collision with the combined legal powers of the U.S. Government and the State of California.

No one contacted by LOOK was willing to accept responsibility for the loans. The bank refused to discuss the situation. Alioto admitted to us that he met with Fratianno in his offices. But, he asserted, he sent Fratianno to the bank only because Teamster organizer Jack Goldberger "vouched" for the ex-convict. Goldberger, in turn, called Alioto's allegations "a lie." He, too, admitted meetings with Fratianno but adamantly denied any role in the loans. Fratianno himself denied everything except receipt of the loans. When we located him in Phoenix, he told us he had never met Alioto or Goldberger.

Back in Chicago, in 1965, Mafia don Frank LaPorte also regarded Fratianno as a good credit risk. At the same time that The Weasel was negotiating the Alioto-arranged loans in San Francisco, LaPorte was creating deals of Byzantine complexity designed to inject 225,000 anonymous dollars into the Fratianno Trucking Co.

Involved were two banks, the Mercantile National Bank of Chicago and the Exchange National Bank of Chicago, and several of LaPorte's relatives and business fronts.

Six days after Alioto's bank made its first loan to Fratianno in San Francisco, a front man for LaPorte borrowed $75,000 from the Exchange National Bank. The money was secured with stocks, and the bank did not question the reason for the loan. A month later, on February 19, 1965, another LaPorte front man, his brother-in-law, Jimmy Ross (né James la DeRosa), received $180,000 from the Mercantile National Bank. The loan, approved by the bank's president, Lewis E. Corrington, Jr., turned out to be grossly unsecured and was later defaulted.

The more than a quarter of a million dollars from both Chicago banks was brought to California by LaPorte and Ross. Somewhere along the line, $90,000 disappeared. Cashier's check #653908 from Mercantile for $150,000 and cashier's check #805546 from the Exchange Bank for $75,000 were turned over to Fratianno for the purchase of trucks and parts.

His newly enlarged truck fleet kept Fratianno busy, but he remained in touch with LaPorte, Bompensiero, the Marinos in San Jose and other friends in Chicago and points East. He was also in touch with Joseph Alioto. Alioto made "at least a dozen" long-distance calls to Fratianno Trucking. A former employee of the firm remembers the calls well and told us: "I was surprised later when I read he was elected mayor, because he seemed so friendly with Jimmy."

FRATIANNO WAS UNDER heavy surveillance, and by the fall of 1965, it was obvious that some new kind of operation was in the works. On October 18, Los Angeles Police Department agents watched LaPorte and Bompensiero check into the fashionable Beverly Wilshire Hotel. Trailing not far behind was The Weasel. As the three Cosa Nostra bosses settled into cushioned comfort in the Brown Derby restaurant across the street, two LAPD undercovermen took the adjoining booth and heard snatches of conversation about the forthcoming business deal.

The following month, Fratianno flew to San Diego where he stayed at Bompensiero's house. On November 15, agents saw the two talking in a car registered to local Mafioso Joe Matranga. One of the subjects under discussion during Fratianno's visit was a plan to sell lard in Mexico in an attempt, with Bompensiero's help, to monopolize the market there. The U.S. officials, who knew what was said, pondered where the two mobsters would get large quantities of lard, of all things. The answer came three weeks later.

On December 6, 1965, Frank Bompensiero boarded Western Airlines Flight #791 in San Diego and flew to Mexico City. There, he checked into the plush El Presidente Hotel. Registered in the same hotel and on hand to meet Bompensiero was Rudolph Papale, president of the Regal Meat Packing Co., of San Leandro, a community across the bay from San Francisco. Bompensiero, we have learned, was there to "fix" things with the government and wasted no time. The two men immediately contacted a Mexican businessman with wide political influence.

According to a U.S. narcotics agent, Bompensiero has myriad connections in Mexico and tried to use them to get Papale a license to ship lard into the country. The two men's activities in Mexico City were of considerable interest to a number of U.S. agencies. Two questions perplexing them were: Who was Rudolph Papale, and was the lard deal his only connection with the San Diego Mafia boss?

Rudy Papale is the brother-in-law of Mayor Joseph Alioto. Alioto personally installed Papale as president of the Regal Meat Packing Co., which is partially owned by Alioto. "This kid is the salt of the earth. Let me tell you, they don't come any better," the Mayor told us. The families of both men are so close that their wives run the jointly owned A. Genaro antique shop on Union Street in San Francisco.

The Mayor's brother-in-law admitted to us that Regal used the services of Frank Bompensiero, the San Diego Mafia leader, after an introduction by Alioto's client, Angelo Marino. He said Regal "picked up" all of Bompensiero's Mexican expenses because he was "doing a favor for us."

Papale and Bompensiero apparently left Mexico separately. Chewing on an expensive cigar, Frank Bompensiero tried to pass through customs in San Diego. Alerted U.S. Customs agents gave him a thorough shakedown. No contraband was found, but three phone numbers in Bompensiero's wallet were. Two were listed to Frank LaPorte in Chicago and one to the Alioto-connected Regal Meat Packing Co., of San Leandro, Calif.

The story behind the Regal Packing Co. leads to still other direct links between Joseph Alioto and the underworld.

Back in the 1940's, long before Regal was founded, three men—Emilio Giorgetti (his spelling), and Louis and Charles Figone—owned Regal's forerunner, the Holly Meat Packing Co., of Oakland. "Gam" Giorgetti earned the money he invested in the $6-million-a-year meat enterprise as proprietor of a number of conspicuous illegal gambling clubs just south of San Francisco. His notoriety won him the title of "Gambling Czar" of San Mateo County.

Illiterate, tough and a millionaire, Giorgetti belonged to the old-fashioned Mafia school known as "Mustache Petes." The key to his success was his 20-year friendship with the local sheriff, James McGrath, who provided protection from police raids. The cost was high, but since Giorgetti often evaded his income taxes, he could afford it.

As early as 1947, Joseph Alioto was the attorney for Holly Packing. He also handled most of Giorgetti's personal legal problems and engaged in mutually

continued

THE MAFIA MEN IN THE MAYOR'S LIFE

Jimmy Fratianno *A Mafia "executioner" credited with a role in at least 16 murders; currently regarded as most influential active mobster on Pacific Coast.*

Salvatore Marino *Ex-Pennsylvania Mafia racketeer now operating in San Jose, Calif.; with son Angelo, controls California Cheese Co.*

Angelo Marino *Believed to be cousin of Bompensiero and leading Mafioso in his own right; in contact with major hoods across the nation.*

Frank Bompensiero *San Diego Mafia leader with reputation as ruthless killer; an ex-convict, he was imprisoned most recently for bribery of public officials.*

Emilio Giorgetti *Deceased millionaire Mafia gambler, hoodlum and political corrupter in San Francisco area in 1940's. Died, natural causes, 1960.*

Frank LaPorte *A top Chicago Mafia boss; controls numerous rackets in Illinois and Indiana; has business interests in California.*

Jimmy Lanza *Aging but influential resident boss of the San Francisco Cosa Nostra; was at a hotel in the vicinity of the 1957 Apalachin meeting of Mafia bosses.*

profitable business with the controversial gangster.

Trouble enveloped Giorgetti in the late 1940's with devastating effect. First, public disapproval of San Mateo County vice conditions forced Sheriff McGrath out of office. Then, state and Federal investigators, heeding the demand for reform, began probing Gam's career.

A brief scandal erupted in 1950 when a recently resigned Treasury agent informed the Kefauver Senate Rackets Investigating Committee that Giorgetti's accountant had told him the gambler's records contained references to massive payoffs of public officials. Through legal maneuvers, Giorgetti's tax lawyer, Joseph Alioto, managed to delay for several months opening the books to investigators. By the time they were opened, no references to payoffs were found and the accountant had died of natural causes. Alioto was president of the San Francisco Board of Education at the time. One local newspaper, the *News*, demanded his resignation because of his "conduct in representing a notorious gambler." Alioto came in for more criticism, this time from some of the senators of the Kefauver Committee, when he advised Giorgetti that it would not be necessary for him to respond to a Committee subpoena to testify in San Francisco. Thereupon, Kefauver ordered Giorgetti to appear before a hearing in Washington.

SOME OF THE HEAT roasting Gam was by then getting to Alioto. He announced that he would not accompany his client to Washington and said he had advised him to tell the truth. He denied the contention that the financial records contained payoff data and added an astonishing statement: "I would withdraw from the case if I thought Giorgetti was a racketeer, mixed up with gangs. I am satisfied he is not."

At that point, San Mateo "Gambling Czar" Giorgetti sought refuge in the more tolerant atmosphere of Las Vegas. There, no one spoke disparagingly of him or such friends as gangsters Sam Termini and Benny Binion. Binion, then Giorgetti's partner in a Las Vegas casino, was not only a "racketeer" but a convicted murderer. Once asked about Binion's modus operandi, a retired police captain replied, "His MO was always the same. Kill 'em dead and they won't give you no more trouble." Such were the people Giorgetti was "mixed up with."

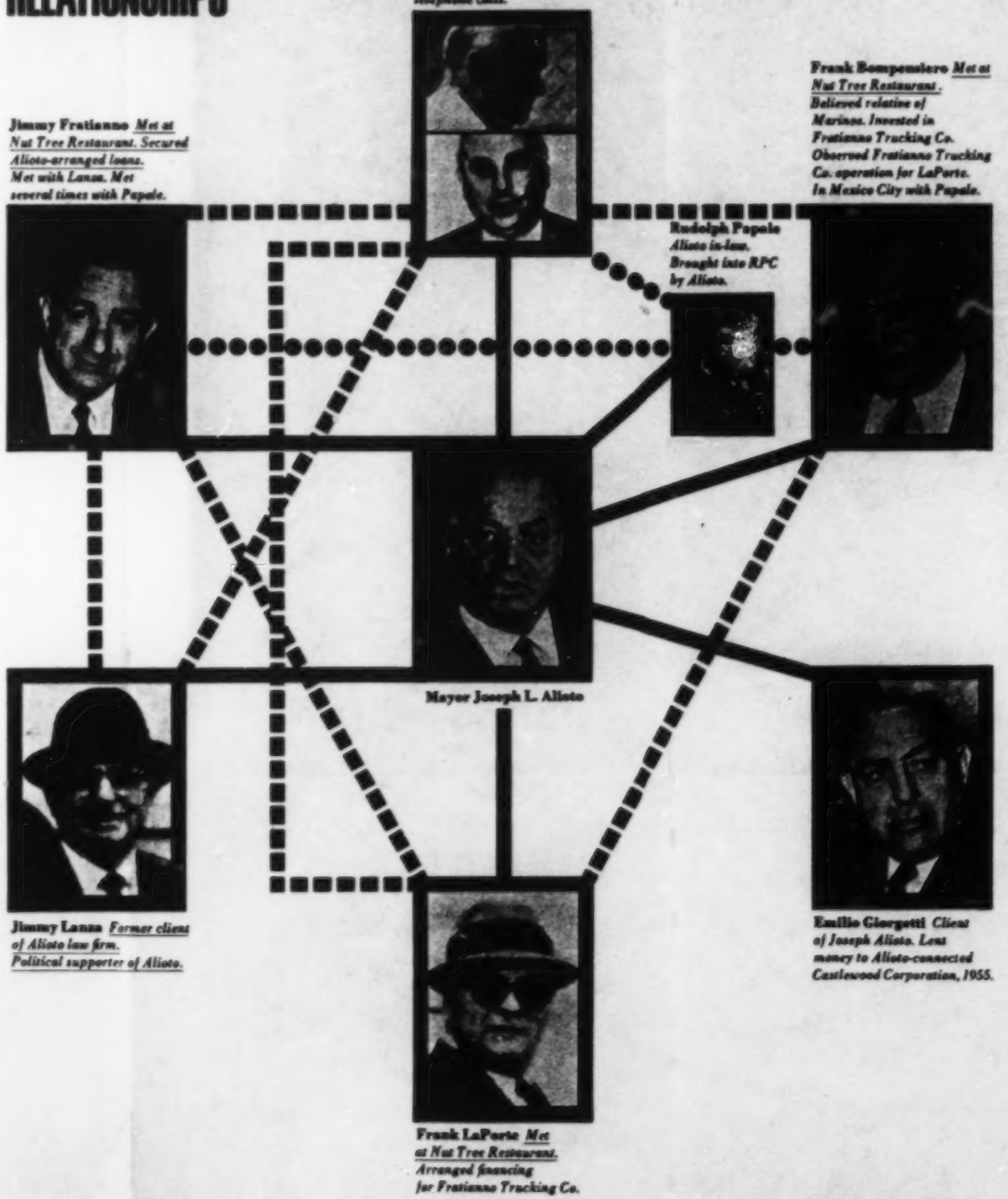
In 1953, Giorgetti, suffering from a throat disease, was indicted for income tax evasion. Alioto returned to Gam's side and succeeded in keeping him out of jail. Giorgetti was convicted, placed on probation and fined $20,000 after Alioto impressed the judge with impassioned pleas that his client would die if imprisoned. Giorgetti paid his fine and had enough left over to invest $100,000 in a hidden interest in a Lake Tahoe casino. According to a Federal report, he stole nearly $500,000 of the casino's profits during the 1955 season.

That year was crucial for Alioto. He had gone into partnership with Giorgetti's Holly Packing partners, Louis and Charles Figone, and two men in a potentially lucrative land-speculation deal. Their company, the Castlewood Corp., needed capital. On January 10, 1955, they turned to Giorgetti. He lent them $55,000 for six months. Alioto and the others signed the promissory note.

To this day, Mayor Alioto says he sees no impropriety in his many dealings with the powerful Mafia gangster. "From the time I knew Giorgetti to the time of his death [1960], he was engaged in no illegal activities whatever"—a statement that ignores the facts.

In 1955, Holly was sold for more than $1 million. With his share of the proceeds, Giorgetti's partner, Louis Figone, founded Regal Packing and picked up where Holly left off. Alioto was the company attorney,

THE WEB OF RELATIONSHIPS


Salvatore and Angelo Marino Legal clients of Alioto. Angelo met at Nut Tree Restaurant. Political contributions to Alioto. CCC does business with RPC. Angelo invested in Fratianno Trucking. Angelo-Papale telephone calls.
Jimmy Fratianno Met at Nut Tree Restaurant. Secured Alioto-arranged loans. Met with Lanza. Met several times with Papale.
Rudolph Papale Alioto in-law. Brought into RPC by Alioto.
Frank Bompensiero Met at Nut Tree Restaurant. Believed relative of Marinos. Invested in Fratianno Trucking Co. Observed Fratianno Trucking Co. operation for LaPorte. In Mexico City with Papale.
Mayor Joseph L. Alioto
Jimmy Lanza Former client of Alioto law firm. Political supporter of Alioto.
Frank LaPorte Met at Nut Tree Restaurant. Arranged financing for Fratianno Trucking Co.
Emilio Giorgetti Client of Joseph Alioto. Lent money to Alioto-connected Castlewood Corporation, 1955.

and in 1957 became a stockholder. In 1960, he was a member of the board of directors. And, that same year, he hired his brother-in-law Rudy.

It was shortly after Papale's elevation to the corporate presidency in 1965 that Regal's lard deal with Frank Bompensiero developed and, eventually, went awry. Jimmy Fratianno told Cosa Nostra pals: "The deal fell through." Papale insisted to us that Fratianno was not a partner in the venture but admitted reluctantly that he, Papale, too had met several times with the Mafioso. Once again, the peripatetic Angelo Marino had made the original introduction, this time in San Francisco.

The Mayor's brother-in-law also revealed to us that the Alioto-connected meat company has over the years marketed many of its products in conjunction with the Marinos' cheese firm. After some prodding, Papale said he had "heard" of the Marino connections with organized crime but nevertheless continues to "socialize" with Angelo Marino.

IN FEBRUARY, 1966, the Mob, in the form of the Fratianno Trucking Co., arrived in El Centro, Calif., to begin work on a $15 million interstate-highway section. The hot, dusty town had never seen anything like it before. Slick city boys with nicknames like "Weasel," "The Lips" and "Nick The Greek" descended on the Imperial Valley community with a roar, dressed in greasy coveralls and leading, thanks in part to Joseph Alioto's financing arrangements, a great vanguard of diesel trucks.

The El Centro project looked financially ripe, and Fratianno extended invitations to a few close friends to get in on the action. One of those who responded was a reputed killer, Leo "The Lips" Moceri, of the Ohio Mafia. Carrying $10,000 in cash with him, Moceri flew to El Centro from Cleveland and moved into an apartment with Fratianno. The money was for "investments" and was immediately loan-sharked to truck drivers at five percent interest per week, or a true rate of over 500 percent interest per annum. Over the years, Moceri the loan shark has been involved in at least 17 murders in Ohio, Michigan, Illinois and Florida. A Federal fugitive for 17 years, Moceri was caught in Hollywood in 1952, "slugging" a pay telephone for a $1.20 toll call. He had $1,800 in cash on him and a new Cadillac parked at the curb. The car was registered to the Marino family's California Cheese Co. branch in Los Angeles, which Moceri was using as a mail drop. Extradited to Ohio, he ended up with a five-year jail term.

Sharing the El Centro apartment with Moceri and Fratianno was Frank Bompensiero, who hated the heat, the flies and, most of all, the trucks. He was LaPorte's man at the construction site, insurance that Fratianno would refrain from cheating.

Bompensiero and Fratianno were joined regularly in El Centro by other veterans of the restaurant meetings involving the Alioto bank. Frank LaPorte and Angelo Marino were in and out of town.

Here was a remarkable gathering of Joseph Alioto's underworld contacts. Present in El Centro was Fratianno, the mobster for whom Alioto had helped to obtain loans; present were LaPorte and Bompensiero, the mobsters who participated in the Nut Tree conferences; present was Angelo Marino, the mobster to whom Alioto had given advice and counsel. Furthermore, during this period, telephone calls were made from Fratianno's apartment in El Centro to Regal Packing, whose president, Alioto's brother-in-law, consorted with Mafiosi.

Incurable greed brought Fratianno down in El Centro. He could not resist the chance to cheat his truck drivers. Because of his Teamsters Union connections, Fratianno seldom paid the legal minimum wage. When a man complained to the Union that he was receiving only $2.50 per hour, less than half of what it should have been, he would be told, "You're working ain't you?" Fratianno's favorite trick in El Centro was to "sell" a truck to the drivers, thereby making them "owner-operators" and subject to considerably fewer protective safeguards.

The house came tumbling down when a Fratianno henchman and drug addict, Nick "The Greek" Diacogianis, slugged a complaining driver. The man went to the Imperial County district attorney's office and filed assault charges. State and Federal investigators stepped in for a closer look, and found numerous violations of law. Fratianno was arrested. His earth-hauling contract abruptly ended, he defaulted on his truck loans. Strangely, unlike most of Fratianno's other creditors, Alioto's bank never sued for damages or recovery of the debt.

Fratianno was convicted of conspiring to violate Federal minimum-wage laws and filing false statements with the Government. The judge surprised everyone by placing The Weasel on probation for three years and levying a $10,000 fine. Fratianno could have received five years in prison.

Besides having to find the money to pay his fine, Fratianno still worried about his bank debt in San Francisco. At the El Centro airport one day in November, 1968, he told a bail bondsman and a state deputy attorney general his problems. "I still owe money to my friend Joe in San Francisco, and I want to pay him back," Fratianno said. When asked who "Joe" was, he replied, "Joe Alioto. You know, the Mayor." The deputy attorney general reported the incident to the FBI and later told LOOK investigators he had "become jaded about political corruption because of my job" and was not surprised that a big-city mayor "would know a bum like that."

Fratianno was not unhappy with his Federal sentence, but his luck ran out when he hit state court. He received a one-to-three-year prison sentence and a fine of $3,000.

As Fratianno plunged to his downfall, Joseph Alioto moved suddenly into the ascendant. When San Francisco's Democratic mayor, John Shelley, announced he would not run for reelection in 1967, party moneymen tapped Joseph Alioto as his replacement. Alioto responded eagerly and won handily. Contributions fueling his expensive campaign came from many sources, including Teamster friends of Fratianno. The Cosa Nostra did its part. Alioto's old associates, the Marinos, dropped "substantial" amounts into the election coffers. Salvatore Marino ("a very fine person," the Mayor told us), whose place on the U.S. Attorney General's list of major racketeers was well known to Alioto, even bought six $100 seats to the Inaugural Dinner.

Both the brother and wife of Bay Area Mafia boss Jimmy Lanza, whose rank as a major Mafia leader was equally well known to Alioto, told a LOOK investigator that Jimmy Lanza, too, had attended the same dinner. Later, Mrs. Lanza changed her mind. She had been mistaken, she said. Her husband stayed home that night.

Now that Alioto is the leading candidate for California's Democratic gubernatorial nomination, a professional political manager and a committee are hard at work raising the wherewithal for the campaign next year. Seen in the files of potential purchasers of tickets to a $100-a-plate fund-raising dinner on September 20 were the names of Salvatore Marino and the California Cheese Co.

Alioto's law firm, in which he still retains an interest, continues to represent the Marinos and the California Cheese Co. His brother-in-law, Papale, remains in frequent friendly contact with Angelo Marino. The latter talks regularly with Bompensiero, who still sees LaPorte. And so on. Mayor Joseph Alioto's channels of communication with the Cosa Nostra remain open.

END

Appendix D

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In the United States District Court
for the Northern District of California

NO. 52150

Joseph L. Alioto
Plaintiff,

vs.

Cowles Communications, Inc.
Defendant.

Judge Russell E. Smith

AFFIDAVIT

RONALD S. DIANA, having been duly sworn, upon his oath, deposes and says:

I am now house counsel for Cowles Communications, Inc., publisher of LOOK magazine. During 1960 to 1965, I was associated with the law firm of Lord, Day & Lord,

counsel to the New York Times, and participated from the trial through the proceedings in the Supreme Court of the United States in the case of *New York Times v. Sullivan.* I am a member of the State and Federal Bars of New York and New Jersey and admitted to practice in the Supreme Court of the United States.

Since the inception of the instant litigation, I have acted on behalf of the defendant Cowles Communications, Inc. in conjunction with our trial counsel Charles W. Kenady, Esquire, of Messrs. Cooper, White & Cooper. The facts set forth herein are based on my personal knowledge.

This affidavit is filed to document the expense incurred by the defendant in conjunction with the instant litigation and the deterrent effect the incurred expenses have had upon the editorial policies of LOOK magazine.

Since the inception of this action, defendant has been required to spend more than $75,000 in out-of-pocket expenses. This does not include payment for the more than 6,000 hours of legal services which the defendant has paid its trial counsel through the end of June 1971. None of this expense is covered by insurance. The amount of money expended by the defendant to date in the defense of this action nearly equals the amount of money known to your affiant to have been expended by the New York Times in the defense of the *Sullivan* case through and including the ultimate reversal of the jury verdict in *Sullivan* by the Supreme Court of the United States.

In October 1969, subsequent to the start of this lawsuit in September 1969, the editors of LOOK magazine received a story proposal relating details of an alliance between certain members of organized crime and legitimate business in the eastern United States. By March of 1970, the story had been researched and the manuscript given legal

approval for publication in LOOK magazine. As a direct result of the expenses which were then being incurred by the defendant in the defense of the instant action, the editors of LOOK magazine were advised by defendant's management through your affiant that the story could only be published if the editor was willing to set aside, out of his editorial budget, at least $50,000 as a legal defense fund. To the editor, this meant that those funds would have to be maintained in reserve until such time as the article has been published and the statute of limitations had passed. As a result, of course, the funds would not be able to have been used by him in the acquisition of other literary properties for publication in LOOK. For that reason, and only for that reason, the editor of LOOK reluctantly concluded that he would be unable to publish the manuscript described above.

Affiant can further state of his own personal knowledge that on numerous occasions during the pendency of this litigation, he has, in the course of his professional duties, been forced to advise the editors of LOOK magazine that the publication of proposed articles calling into question the qualifications of public officials would, as in the instance above, expose LOOK magazine to the non-recoverable expenditure of substantial sums in the successful defense of libel actions which such publication might well provoke; that upon receipt of such advice, the editors have passed over such articles in favor of less controversial subject matter.

That by reason of the above, your affiant firmly believes that as a direct consequence of the expense of this litigation, the editorial freedom of the editors of LOOK magazine has been substantially restricted; that, by example, other publishers have also avoided controversial subject matter

as a precaution against exposure to equivalent financial losses; and that the free flow of information to the American public on matters of public concern has been materially abridged.

RONALD S. DIANA

.....

Ronald S. Diana

Subscribed and sworn to before
me this 11th day of August,
1971.

.....[SEAL]

DORIS I. MARTIN

Notary Public

Supreme Court, U. S.
FILED
OCT 9 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-410

COWLES COMMUNICATIONS, INC., *Petitioner,*

vs.

JOSEPH L. ALIOTO, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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I

ARGUMENT

The respondent, Joseph L. Alioto, respectfully opposes the petition for certiorari upon the following grounds:

A. THIS CASE PRESENTS NO INVASION OF PETITIONER'S RIGHTS UNDER THE FIRST AMENDMENT

From the outset in this case, no party has doubted that respondent, a public official and a member of the Bar of this Court, must bear the full burden of proof imposed

by *Times v. Sullivan.* Respondent, plaintiff below, has understood its burden to be proof by a preponderance that the article in question, which was published to eight million people and which clearly concerns the plaintiff, is false and is defamatory, and proof by clear and convincing evidence that the false and defamatory matter was published by petitioner with knowledge of its falsity or in reckless disregard of its truth or falsity.

In both trials of this case, the jury was instructed to find that the linchpin Nut Tree allegations of the article were false. In the first trial, the jury was given general verdict forms and was unable to return a verdict. In the second trial, the jury specially found by a vote of 12 to 0 that the article was false in one or more particulars and also that it was defamatory. The jury hung on the issue of malice.

The first trial judge denied defendant's successive motions for summary judgment, directed verdict, and judgment n.o.v., all based on malice. The second trial judge denied a renewed motion for summary judgment, but granted defendant's motion for judgment n.o.v. In so doing the trial Court stated that its view of the matter was subjective, and that another judge might see the interplay of the facts differently, and that plaintiff had presented evidence from which the jury reasonably could find malice by clear and convincing evidence. (Petition, Appendix B, pp. 9-10). That is, the second trial judge held after trial that while the case was one for the jury, he would not have found for plaintiff in a judge-tried case. Ibid.

In reversing the ensuing judgment, the Ninth Circuit has also found from its review of the evidence that the

evidence is sufficiently strong to support a finding of malice by clear and convincing evidence. (Appendix A, p. 8).

Hence, two trial judges and the Court of Appeals have examined the evidence of malice and found it sufficient for submission to a jury.

Briefly, the evidence of malice is as follows. The Nut Tree meetings were related to the authors by the son-in-law, Thomas, of one of the Mafia figures in the story. (C.Tr. 2032; Tr. 1439).[1] Thomas did not claim to have attended any of the meetings, and had never seen plaintiff except on television, but was the sole source of the Nut Tree allegations. (Tr. 1442). He also related to the authors Mafia connections of three other nationally known politicians. (Tr. 1403). Thomas was a person of exceedingly low moral character, according to the information which Thomas had given to the authors. (Plaintiff's Exhibits 2, 4). Also, he successfully evaded subpoenas for both trials.

In a long interview with the plaintiff prior to publication and after the Thomas revelations, the authors did not ask whether plaintiff had attended the alleged Nut Tree meetings. At the interview plaintiff told the authors in answer to their questions that he had never met or heard of Bompensiero or La Porte, who are described in the article as a killer and a racketeer, respectively. (Tr. 377-382). Nonetheless, the article depicts plaintiff as a confederate of these two at the secret meetings.

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[1] "C.Tr." refers to the Clerk's Transcript; "Tr." refers to the Reporter's Transcript.

The article states that plaintiff's name appears in dozens of law enforcement intelligence reports. Plaintiff, of course, has no criminal record. (Tr. 1002-3). The publisher testified that he had never seen any such report, and no such reports were produced at trial. (Tr. 1943-45).

The article tends to characterize separate attorney-client relationships between plaintiff and Emelio Giorgetti and plaintiff and Salvatore Marino as Mafia relationships. (C.Tr. 614-617).

A great mystery in the case is why the F.B.I. granted to the young authors some 13 interviews between April and September, 1969, and made files and records available to them. An F.B.I. agent, Herbert Mudd, testified at the trial that he had been deceived by the young authors, and believed that they were writing a story about James Fratianno, who appears in the article.

There is other evidence of malice. The article omits any material which would permit the reader to conclude that the Fratianno loans from the First San Francisco Bank were normal commercial transactions and not the result of a Mafia cabal, even though such material was in the authors' notes. (Tr. 2709). Thus, the authors omit from the story the fact that Fratianno received greater loans from other banks, without any intervention of the plaintiff, before receiving a loan from First San Francisco Bank. (Tr. 2759).

While the plaintiff had an interview with the authors, there was none with responsible officers of the defendant publisher, despite plaintiff's repeated requests for an interview. (Tr. 359-78). The article purports to relate plaintiff's conduct over a period of decades and was not

hot news. The only urgency to publish the article would have come from a desire to have the article appear shortly before a fund raising dinner for plaintiff, which dinner is mentioned in the second to last paragraph of the article.

Defendant has stated by interrogatory answer that it does not believe that plaintiff is a member of the Mafia, has committed any criminal act or has furthered any criminal purposes of the Mafia. (C.Tr. 785; Tr. 1403, 1932-4, 2663). The article as a whole is contra.

At the time of publication of the article, Look, like the Saturday Evening Post in the *Butts* case, was in the advanced stages of collapse. (C.Tr. 1669; Tr. 623-4).

It is submitted that there is ample evidence of reckless disregard and intentional falsehood in the record, and that in the prior proceedings in this case defendant's rights under the First Amendment have been carefully observed, including review of the evidence by the Ninth Circuit and the District Judges.

B. THE ASSERTED CONFLICT IN THE CIRCUITS IS ILLUSORY

A concurring opinion in *Wasserman v. Time, Inc.*, 424 F.2d 920 (D.C. Cir.), *cert. denied* 398 U.S. 940 (1970), entirely dicta, states that in a First Amendment libel case the judge must find malice in the same sense that he would make such a finding in a judge-tried case, before the matter may be submitted to the jury, or in order for a plaintiff's verdict to be upheld. Under this approach, the plaintiff would prevail only if the judge finds in his favor and the jury does also. If the judge would find for

plaintiff, but the jury does not, defendant prevails. If the judge would find for defendant, the case is not submitted to the jury, even though the judge agrees that reasonable men might find for plaintiff.

This complicated formula was dicta in the case in which it was announced and has not been followed in any other case known to respondent. In *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 at pp. 864-6 (5th Cir. 1970), the Court cited and quoted the "two-step" language of *Wasserman v. Time, supra,* but adhered to the traditional and more even-handed standard of review:

> "We are convinced that Bon Air has not presented issues of fact from which a jury could find that Time published the article with actual knowledge of its falsity or with a reckless disregard as to whether or not it was false.[21]"

The footnote reads:

> "[21]The following statement by Judge Tuttle in *McLaney* [Time, Inc. v. McLaney, 5 Cir., 1969, 406 F.2d 365] seems pertinent here:
>
> 'Where • • • it is plain that the record has been fully developed by depositions and affidavits on a motion for summary judgment, and such record demonstrates that, construing all of the facts and inferences to be drawn therefrom in favor of the party against whom the judgment is entered, he would not be entitled to have a jury verdict stand, we have not hesitated to hold that the grant of summary judgment is proper,' 406 F.2d at 571-572."

Similarly in *Vandenberg v. Newsweek, Inc.*, 507 F.2d 1024 (5th Cir. 1975) and *Baxter Berry v. National Broadcasting Company, Inc.*, 480 F.2d 428 (8th Cir. 1973), *cert. denied* 418 U.S. 911 (1974), the Courts merely found upon their review of the evidence that it would not support a jury verdict for plaintiff. These cases do not conflict in principle or rule of law with the case at bar, where the Court of Appeals and two trial judges have held that the evidence of malice is sufficiently strong to support a jury finding in plaintiff's favor.

C. THIS CASE PRESENTS NO ISSUE UNDER ERIE v. TOMPKINS

One reason for the *Erie* doctrine is uniformity of substantive rules of law in the state court and in the federal diversity court. *Hanna v. Plumer,* 380 U.S. 460 (1965). In interpreting the California retraction statute and the recent case of *Montandon v. Triangle Publications,* 45 Cal. App.3d 938 (1975), in which counsel for petitioner in the case at bar represented the publisher, the Ninth Circuit in the case at bar has clearly adhered to the same rule of law which would be applied if this case were pending in the state system.

D. THE JUDGMENT OF THE NINTH CIRCUIT IS NONFINAL AND INTERLOCUTORY

This action has been remanded to the District Court for trial on the issue of malice alone. If defendant prevails, the issues which it now asks this Court to review will become moot. If plaintiff prevails, issues now raised in the instant petition may be reviewed on a subsequent petition in this Court. *Hamilton-Brown Shoe Co. v. Wolf Brothers Company,* 240 U.S. 251 at p. 258 (1915).

II

CONCLUSION

The democratic process is not served by defamatory falsehoods. Here the evidence will support a finding that defamatory falsehoods about plaintiff were published with knowledge of their falsity. The Constitution should accord no protection to deliberate lies or reckless publication of defamatory falsehood.

The petition should be denied.

Dated, October 8, 1975.

Respectfully submitted,

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Attorneys for Respondent.